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October Term, 1974
No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents

On Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA AND THE STATES OF FLORIDA, GEORGIA, HAWAII, INDIANA, IOWA, MARYLAND, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS AND WEST VIRGINIA, AMICI CURIAE

ROBERT P. KANE
Attorney General
LAWRENCE SILVER
Deputy Attorney General,
Chief, Civil Litigation
MELVIN R. SHUSTER
Deputy Attorney General
Dept. of Justice
Capitol Annex
Harrisburg, Pa. 17120

(Continued Inside Cover)

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Bldg.
Atlanta, Georgia 30334

RONALD AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

THEODORE L. SENDAK
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

RICHARD C. TURNER
Attorney General of Iowa
1223 E. Court Room 201
Executive Hills, East
Des Moines, Iowa 50319

FRANCIS B. BURCH
Attorney General of
Maryland
One South Calvert Street
14th Floor
Baltimore, Maryland 21202

JOHN C. DANFORTH
Attorney General of
Missouri
Supreme Court Building
Jefferson City, Mo. 65101

PAUL L. DOUGLAS
Attorney General of
Nebraska
State Capitol
Lincoln, Nebraska 68509

ROBERT LIST
Attorney General of Nevada
Supreme Court Bldg.,
Capitol Annex
Carson City, Nevada 89701

DAVID H. SOUTER
Attorney General of New
Hampshire
State House Annex
Concord, New Hampshire
03301

Of Counsel:
C. RAYMOND MARVIN
1150 17th Street N.W.
Suite 602
Washington, D.C. 20036

WILLIAM F. HYLAND
Attorney General of New
Jersey
State House Annex
Trenton, New Jersey 08625

RUFUS L. EDMISTEN
Attorney General of North
Carolina
Justice Bldg.
P. O. Box 629
Raleigh, North Carolina
27602

ALLEN I. OLSON
Attorney General of North
Dakota
State Capitol
Bismark, North Dakota
58501

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

DANIEL R. McLEOD
Attorney General of South
Carolina
Hampton Office Bldg.
Columbia, South Carolina
29211

R. A. ASHLEY, JR.
Attorney General of
Tennessee
Supreme Court Building
Nashville, Tennessee 37219

JOHN L. HILL
Attorney General of Texas
Supreme Court Bldg.
Austin, Texas 78711

ANDREW P. MILLER
Attorney General of
Virginia
Supreme Court Library
Bldg.
Richmond, Va. 23219

CHAUNCEY H. BROWNING,
JR.
Attorney General of West
Virginia
State Capitol
Charleston, West Virginia
25305

**Attorneys for Amici
Curia**

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INTEREST OF AMICI

The Commonwealth of Pennsylvania, joined by the Commonwealth of Virginia and the States of Florida, Georgia, Hawaii, Indiana, Iowa, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas and West Virginia, submits this brief *amici curiae* to register its support of the proposition advanced by the State of Connecticut that attorneys' fees may not be awarded against a state given the prohibitions of the Eleventh Amendment. The Commonwealth, as the employer of over one hundred thousand persons, has a clear interest in the interpretation of the provisions of Title VII of the Civil Rights Act of 1964. Additionally, the Commonwealth must defend numerous civil rights actions brought under 42 U.S.C. §1983. In the context of suits under these statutes, the issue of the award of attorneys' fees is a constantly recurring one.

By its very nature, an award of attorneys' fees cannot be predicted by the Commonwealth as an inevitable consequence of civil rights litigation. Aside from the issue of liability on the merits, the decision whether to award attorneys' fees lies in the sound discretion of the Court. The Commonwealth, as is true of all states, must manage its fiscal affairs based upon its perception of expenditures necessary to operate the government in any fiscal year, and then abide by budgetary allocations.

Moreover, the payment to private counsel of attorneys' fees by the state, using public monies, is not a proper

expenditure of such monies absent statutory authority. No general or specific appropriation exists from which such monies might be paid, nor is one likely to be enacted. For a court to compel the payment by Pennsylvania defendants of attorneys' fees would force them to violate Article III, §24 of the Pennsylvania Constitution, which provides that "no money shall be paid out of the treasury, except on appropriation made by law and on warrant issued by the proper officers." The determination of how its revenues are to be spent is peculiarly and uniquely the right of the members of the General Assembly of the Commonwealth. Awards of attorneys' fees in litigation against the Commonwealth would constitute a constitutionally impermissible interference with this sovereign prerogative.

Accordingly, the Commonwealth of Pennsylvania, joined by the aforementioned states, urges the reversal of the decision of the Court of Appeals below asserting the jurisdiction of the federal courts to award attorneys' fees, which must be paid out of state treasuries, to successful litigants against the state.

SUMMARY OF ARGUMENT

The award of attorneys' fees by a federal court against a state absent its consent to suit is inconsistent with the provisions of the Eleventh Amendment to the United States Constitution. This Court has consistently held that the federal courts lack jurisdiction to award money damages against a state, since such awards would be paid from the state treasury and would constitute an unconstitutional interference in the operation of its fiscal affairs, an activity closely bound up with a state's sovereignty. This principle was most recently affirmed by this Court in *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974).

Courts below have cited *Edelman* both to deny and to support the award of attorneys' fees against the state. Those courts viewing *Edelman* as allowing such fees rely on the language in the Court's opinion permitting ancillary effects on the state treasury. It is clear, however, that the Court approved only those fiscal consequences necessarily arising out of a state's compliance with the prospective terms of judicial orders. Payment of attorneys' fees does not fall within that category.

A state may consent to suit and waive its immunity under the Eleventh Amendment. However, in this case, the Congress did not intend to subject the states to suit under Title VII of the Civil Rights Act, nor did the State of Connecticut consent to such suit. Since both of the tests set forth in *Parden v. Terminal Ry. of Ala. St. Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207 (1964), are not met here, no waiver of immunity may be ascribed to Connecti-

cut. As a result, the discretionary award of attorneys' fees cannot be made under 42 U.S.C. §2000e-5 (k).

Nor may respondents avail themselves of either of the common-law exceptions to the traditional American rule that the prevailing party may not recover attorneys' fees as costs or otherwise. Since money damages may not be recovered from the state, no common fund exists from which the fees may be taken. Drawing from future benefits produced through implementation of injunctive relief fails to satisfy this theory's requirements of an identifiable class and the ability to shift fees with exactitude. The "bad faith" exception also is inapplicable, being punitive in nature, and not necessary to insure compliance with federal law prospectively.

Finally, this Court's decision in *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 48 S. Ct. 97 (1927), awarding costs against a state, is not controlling on the question of attorneys' fees. Indeed, this Court's recent decision in *Edelman v. Jordan,* supra, compels the conclusion that the recovery of costs from the state, like the award of attorneys' fees, also contravenes the provisions of the Eleventh Amendment.

ARGUMENT

THE ELEVENTH AMENDMENT BARS THE RECOVERY OF ATTORNEYS' FEES FROM THE STATE

A. The Doctrine of Edelman v. Jordan Precludes the Award of Attorneys' Fees Against the State

In its recent decision in *Edelman v. Jordan*, 415 U.S. 651, 665, 94 S. Ct. 1347, 1356 (1974), this Court held that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.[1] The Court rejected the concept of "equitable restitution" as a basis for granting a retroactive award of monetary relief, recognizing that such recovery would undoubtedly be paid from state funds and would therefore be tantamount to an award of damages against the state.[2] It is submitted that

[1] The Eleventh Amendment provides:

"The judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of another State, or by Citizens or Subjects of any Foreign State."

[2] In *Edelman*, recipients of benefits from federal-state programs of Aid to Aged, Blind & Disabled (AABD) brought a class action for declaratory and injunctive relief to bring about the timely processing of benefits and to recover retroactively payments wrongfully withheld. The Court affirmed the lower court's award

this same reasoning applies equally to an award of attorneys' fees in actions brought against state officials acting in their official capacities.

The rule recognized by the Court's decision in *Edelman* is that when private parties seek to impose a liability which must be paid from public funds in the state treasury, the Eleventh Amendment is a bar to such suit. Citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S. Ct. 347 (1945), the Court concluded that, absent waiver by the state, the actual source of the funds to be recovered is determinative of the invocation of this defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Id. at 464, 65 S. Ct. at 350." 415 U.S. at 663, 94 S. Ct. at 1356.

Courts in several circuits have relied upon the foregoing rationale in *Edelman* in denying an award of attorneys' fees in actions brought against state officials.

In *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (3rd Cir. 1974), vacated and remanded, U.S. , 44 L. Ed. 2d 474 (1975), the Third Circuit Court of Appeals held that "Edelman, while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well." 501 F. 2d at 43. In a lengthy footnote, the Court rejected the possible argument that this Court's failure to overrule

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of prospective injunctive relief, but reversed the affirmance by the Court of Appeals of the District Court's order requiring the payment of retroactive benefits.

its summary affirmance in *Sims v. Amos*, 409 U.S. 942, 93 S. Ct. 290 (1972), affirming 336 F. Supp. 924 (M.D. Ala. 1972) (3-Judge Court), indicated its intention to leave the question open.[3] Rather, the omission was viewed as one of inadvertence, with the court concluding: "We think Edelman must be read as closing the door on any money award from a state treasury in any category." 501 F. 2d at 43.[4]

The Court of Appeals for the Sixth Circuit, in *Jordan v. Gilligan*, 500 F. 2d 701, cert den. U.S. , 44 L. Ed. 481 (1975), also adheres to this view. In vacating an award of attorneys' fees to plaintiffs successful in challenging a reapportionment plan for the Ohio Legislature under 42 U.S.C. §1983, the court stated:

> "This cause, insofar as the award of attorneys' fees is concerned, although nominally against the Chief Executive and other officials of the State of Ohio, in substance and effect was against the State. Any award of attorneys' fees, whether against the state of Ohio or its officials, vitally affects the rights and interests of the state in preserving its revenues." 500 F. 2d at 705.

Following *Skehan*, supra, in its reliance upon *Edelman*, the Sixth Circuit Court concluded that "the Eleventh Amend-

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[3] In *Sims*, where attorneys' fees were awarded against various state officials, the constitutional question here at issue had been given cursory treatment in a footnote to the opinion. *Sims v. Amos*, supra, 340 F. Supp. at 694, n. 8.

[4] In an order dated May 27, 1975, this Court granted certiorari in *Skehan*, and then vacated the judgment and remanded to the Court of Appeals for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612 (1975), and *Wood v. Strickland*, 95 S. Ct. 992 (1975).

ment prohibits the awarding of attorneys' fees against unconsenting sovereign states." 500 F. 2d at 709. Accord, *Taylor v. Perini*, 503 F. 2d 899 (6th Cir. 1974), vacated on other grounds, U.S. , 44 L. Ed. 2d 474 (1975); *Named Individual Members v. Texas Highway Department*, 496 F. 2d 1017 (5th Cir. 1974).

Appellate courts in other circuits have arrived at the opposite conclusion, relying upon different language in *Edelman* to allow the award of attorneys' fees against the state. In *Souza v. Travisono*, 512 F. 2d 1137 (1st Cir. 1975); *Class v. Norton*, 505 F. 2d 123 (2nd Cir. 1974); and *Jordan v. Fusari*, 496 F. 2d 646 (2nd Cir. 1974), these circuit courts upheld the award of attorneys' fees as having a permissible "ancillary effect on the state treasury" resulting from compliance with the award of injunctive relief. While these courts did not deny that such an award must issue from public funds in the state treasury, they viewed it as having a minimal impact upon state finances, as well as being a necessary incident to the award of injunctive relief.

However, the context of this language in the *Edelman* opinion establishes that the focus of the Supreme Court was limited to the expenditure of state funds necessary in complying with whatever injunctive relief was afforded. Referring to prior Supreme Court decisions, the effects of which were to increase future welfare benefits paid from state treasuries,[5] the Court explained:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective

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[5] See, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).

> in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in Ex Parte Young, supra.*" 415 U.S. at 668, 94 S. Ct. 1358. (Emphasis supplied.)

Unlike the "ancillary effect" occasioned by prospective injunctive relief, the award of attorneys' fees is more analogous to a recovery of damages for breach of a legal duty.

The course of the instant litigation mirrors this difference in interpretation of *Edelman.* In denying an award of attorneys' fees, the District Court followed the view of *Jordan v. Gilligan*, supra, concluding that: "While the amount sought in this case is not prohibitive, once the floodgates are opened, adequate control no longer prevails." *Fitzpatrick v. Bitzer*, 390 F. Supp. 278, 289 (D. Conn. 1974). On appeal, the Court of Appeals adopted the view that:

> "In order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees which, as we recently held in Class v. Norton, 505 F. 2d 123, 126-27 (2nd Cir. 1974), may be assessed as having a permissible 'ancillary effect' on the state treasury, see Edelman v. Jordan, 415 U.S. at 667-68, of a prospective order." *Fitzpatrick v. Bitzer*, 519 F. 2d 559, 571 (2nd Cir. 1975).

The issue thus joined requires this Court to identify the category into which the award of attorneys' fees falls: that

of retroactive monetary damages or that of equitable relief provided by injunction. The resolution of the question may be found in an examination of the reasons for the adoption of the Eleventh Amendment, its subsequent application in cases before this Court, and the purposes and effects of attorneys' fees awards in light of those precedents.

B. The Court Has Consistently Refused To Permit Recovery of Monies From State Treasuries

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Adopted by the states subsequent to this Court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793),[6] the Eleventh Amendment served to calm the widespread fears that the federal courts would be used by former British Loyalists to press for payment of debts and other claims against the states incurred during the Revolutionary War. Such suits were viewed as a threat to the fiscal autonomy, and possibly financial stability, of the states.[7] Moreover, the Amendment restored the concept of state sovereignty in the federal system to the position it had occupied prior to the ratification of the Constitution.[8]

Nevertheless, in *Osborn v. United States Bank*, 22 U.S. 738 (1824), the Court narrowly construed the Eleventh Amendment, limiting its application to suits

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[6] The decision in *Chisholm v. Georgia* upheld the jurisdiction of the federal courts under Article III to hear suits brought by the citizens of one state against another state to recover on debts owed by the state.

[7] See, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276, n. 1, 79 S. Ct. 785 (1959).

[8] See, *Hamilton, The Federalist*, No. 81.

where the state is a party of record, in order to uphold an injunction against the collection of a state tax imposed upon the Bank of the United States. The language of Chief Justice Marshall's decision, decidedly Federalist in tone, underscored the necessity for the federal courts to exercise jurisdiction over the actions of state officials, despite the Eleventh Amendment, in order to preserve the supremacy of federal law. The alternative presented would be that:

> "Each member of the Union is capable, at its will, of attacking the nation, of arresting its programs at every step, of acting vigorously and effectively in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws otherwise than by proceedings which are to take place after the mischief is perpetrated and which must often be ineffectual, from the inability of the agents to make compensation." 22 U.S. at 846.

Between the Court's decision in *Osborn* and its ruling in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), Congress made the federal courts the primary guardians of Constitutional rights, with *Ex parte Young* being "the culmination of this Court's efforts to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma*, 401 U.S. 82, 106, 91 S. Ct. 674, 687 (1971) (Brennan, J., concurring in part and dissenting in part).

In *Ex parte Young*, supra, several railroads and their shareholders alleged the unconstitutionality under the Fourteenth Amendment of certain railroad rates, and sought and obtained in federal court an injunction against

the Attorney General of Minnesota restraining him from enforcing as against them penalties specified in the state act under challenge. The Attorney General claimed the Eleventh Amendment deprived the federal court of issuing such an order, and went ahead to enforce the criminal sanctions of the state act.

Upholding the lower court's power to restrain the Attorney General's actions and the subsequent action for contempt, this Court held:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and be in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to *the supreme authority of the United States.*" 209 U.S. at 159-60, 28 S. Ct. at 454. (Emphasis supplied.)

In order to vindicate Constitutional law and overcome the Eleventh Amendment proscription against suits brought against the state, it was necessary for the Court to remove the mantle of sovereign immunity from the actions of state officials by creating the fiction that such actions represented breaches performed in an individual, not official, capacity. Such a theory had precedential support extending from *Osborn v. United States Bank*, supra; *Davis v. Gray*, 16 Wall 203 (1872); and *Poindexter v. Greenhow*, 114 U.S. 270, 5 S. Ct. 903 (1855).

However, the Court also took cognizance in *Young* of those cases in which actions nominally brought against

state officials to enforce the performance of contracts with the state actually constituted suits against the state itself, because if relief were allowed the state treasury itself would be directly affected. *Hagood v. Southern*, 117 U.S. 52, 6 S. Ct. 608 (1886); *In re Ayers*, 123 U.S. 443, 8 S. Ct. 164 (1887). This Court in *Edelman* specifically alluded to *Hagood* and *Ayers* to "demonstrate that equitable relief may be barred by the Eleventh Amendment". 415 U.S. at 667, 94 S. Ct. at 1347. Accordingly, the scope of the Court's decision in *Ex parte Young* cannot be construed to have sanctioned federal jurisdiction to hear suits the object of which would be to effect recovery of funds from the state treasury. Rather, the thrust of *Ex parte Young* was to insure the compliance of state officials with the supremacy of federal law, not to require the expenditure of state funds and thereby encroach upon a fundamental attribute of state sovereignty—its fiscal integrity.

Cases subsequent to *Ex parte Young* demonstrate the continued application of this principle. In *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54, 64 S. Ct. 873, 876 (1944), the Court observed:

> "The principle of immunity from litigation assures the states and the nation from anticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent of the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures."

Accord, *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 66 S. Ct. 745 (1946). The focus in these cases

was directed to the absence of any consent to suit in a federal forum for the recovery of taxes, and the concurrent exclusivity of a state forum provided for that purpose. However, implicit in these decisions was the immunity of the state from suit in even its own courts absent its consent, *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890), particularly in matters regarding state finances.

C. Congress Has Not Abrogated the State's Immunity Under Title VII

It is not disputed that attorneys' fees in this case would be paid from funds in the state treasury. Respondents in the Court below, predicated their claim to such an award upon the statutory authority of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k), and upon the power of the Court to award attorneys' fees as an incident to the prospective relief granted. The Court of Appeals concurred, allowing that the award would have only an ancillary effect on the state treasury permitted by *Edelman v. Jordan*, supra.

Respondents' reliance upon §2000e-5(k) is misplaced. Given the Eleventh Amendment bar to suits against the state, unless the State of Connecticut waived its immunity from suit under Title VII, the above section providing for the discretionary award of attorneys' fees is of no effect. Although respondents suggest that additionally a waiver of a state's Eleventh Amendment immunity can be effected by Congress, that suggestion ignores the constitutional limitations on Congress in a case such as

this. The question of whether Congress has sought to abrogate the state's Eleventh Amendment immunity in order to regulate proprietary activities not bound up with its sovereign functions is not the issue here as it was in *Parden v. Terminal Ry. of Ala. St. Docks Dept.,* 377 U.S. 184, 84 S. Ct. 1207 (1964). The State of Connecticut and all other states, in performing the basic governmental functions of hiring employees and providing benefits for their retirement, engages in activities intimately bound up with the exercise of its sovereign powers. Congress cannot erode the state's Eleventh Amendment immunity by requiring it to submit to federal jurisdiction under Title VII or, in effect, cease to function by virtue of not employing any governmental personnel.

Although, in *Parden v. Terminal Ry. of Ala. St. Docks Dept., supra,* the court found that Congress, in passing the Federal Employees' Liability Act, 45 U.S.C. §51, *et seq.,* intended to abrogate the immunity of the states, that case involved the regulation of proprietary activities, *i.e.,* the operation by the State of Alabama of a railroad operating in interstate commerce which therefore made it a common carrier within the terms of FELA. Furthermore, the court's decision did not rely entirely upon a finding of Congressional abrogation. It also found that the state operated the railroad after the passage of the federal statutes and thereby consented to suit in federal courts under FELA. *Employees v. Department of Public Health & Welfare,* 411 U.S. 279, 93 S. Ct. 1614 (1973).

Moreover, in *Employees,* the Court refused to extend its finding in *Parden* of Congressional abrogation of immunity "to cover every exercise by Congress of its commerce power" and noted that "the concept of implied con-

sent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which [the Supreme Court] generally associate[s] with the concept of constitutional waiver." *Employees*, supra, at 296, 93 S. Ct. at 1624 (Marshall, J., concurring) (citations omitted).

Involved in *Employees* was the application of 516 (b) of the Fair Labor Standards Act, which subjects employers to damage actions for violations of the Act. Notwithstanding that state-owned hospitals and schools were an "employer" under the term of the Act, the Court rejected the argument that Congress intended to abrogate the state's immunity from suit:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.
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> * * * * * * *
>
> "It is true that, as the Court said in Parden, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend Parden to cover every exercise by Congress of its commerce power, when the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." *Employees*, supra, at 285, 286, 93 S. Ct. at 1618, 1619.

Thus, even if Congress could constitutionally abrogate a state's Eleventh Amendment immunity, the intent of Congress to abrogate a state's immunity by amending Title VII is not present in this case as it was not present in *Employees*. This is best demonstrated by an analysis of the 1972 amendments to Title VII. Prior to the 1972 amendments, §2000e-5(e) provided, in pertinent part:

> "If within thirty days after a charge is filed with the Commissioner or within thirty days after expiration of any period of reference under subsection (c) of this section . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

By enacting Public Law 92-261,[9] Congress amended Title VII to include "government", "governmental agencies" and "political subdivisions" as employers under the Act, 42 U.S.C. §2000e, in much the same way as Congress amended the FLSA to include government hospitals, institutions, schools, etc., as employers under that Act. See §102(b) of Public Law 89-601. Public Law 92-261 also amended and redesignated §2000e-5(e) and its provisions now appear as §2000e-5(f)(1). The 1972 amendments to Title VII, as contained in §2000e-5(f)(1), specifically provide for suits by the Attorney General of the United

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[9] 86 Stat. 103.

States against governmental entities in the appropriate district court:

> "In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court. . . ."

The amendments do not make a similar provision for suits by a private party against a state. Indeed, both prior and subsequent to the 1972 amendments, Title VII provided for private civil actions solely against "the respondent named in the charge".

The 1972 amendments to Title VII no more lifted the immunity of the states than did the 1966 amendments to the FLSA. Indeed, here Congress' intent to abrogate the state's immunity is totally lacking. Accordingly, assuming arguendo that Congress can constitutionally abrogate a state's Eleventh Amendment immunity, the absence of such Congressional intent defeats the application of §2000e-5(k) as a source of attorneys' fees in this action.

D. The State of Connecticut Has Not Waived Its Immunity From Suit Under the Eleventh Amendment

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The same reasoning employed by the Court of Appeals below to reject any inference of voluntary waiver or con-

sent with regard to private damage suits under Title VII, 42 U.S.C. §2000e-5 (q), is equally applicable to an award of attorneys' fees under §2000e-5 (k). Connecticut's performance of the governmental function of hiring employees to perform state duties and providing for their retirement clearly antedated the 1972 amendment to §2000e bringing the states within the scope of the Title VII, and the continuation of those functions can in no way be construed as a voluntary waiver of sovereign immunity with respect to *any* of the act's provisions. Cf. *Fay v. Noia*, 372 U.S. 391 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Mr. Justice Marshall took a similar view in his concurring opinion in *Employees*, supra, in which he rejected any waiver of immunity by the state with respect to the application of the FLSA to employees of various facilities operated by the Missouri Department of Public Health & Welfare:

> "Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operations of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case." 411 U.S. at 296, 93 S. Ct. 1624.

The state's posture in *Employees* was deemed unlike the factual circumstances in *Parden*, supra, in which the Federal Employees' Liability Act was held applicable to the State of Alabama. As in *Employees*, and in contrast to *Parden*, the State of Connecticut engaged in employment practices governed by Title VII before the statute was made

applicable to governmental bodies in 1972, and therefore could not be viewed as having consented to suit under the Civil Rights Act's provisions. As the Court said in *Edelman v. Jordan*, supra:

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] have no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464 (1909)." 415 U.S. at 673, 94 S. Ct. at 1361.

Since the State of Connecticut gave no express waiver of its immunity from suit with respect to Title VII, it cannot be subject to any of the statute's provisions, including §2000e-5(k).

E. Recovery of Attorneys' Fees From the State May Not Be Predicated Upon the Common Fund or Bad Faith Exceptions to the American Rule

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Since the Eleventh Amendment remains a bar to the application of §2000e-5(k) and its authorization of an award of attorneys' fees, respondents might seek to rely upon some commonlaw base for such an award. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 258, 95 S. Ct. 1612 (1975), this Court made clear that, in the absence of an applicable statutory provision allowing

attorneys' fees, an award under a "private attorney general" theory is precluded, notwithstanding that it has been brought under 42 U.S.C. §1983 for the purpose of vindicating constitutional rights. But cf., *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S. Ct. 964 (1968). Although the Court of Appeals' view that the incurring of attorneys' fees was necessary in this case to bring the state officials' conduct into conformity with federal law suggests the application of the private attorney general theory, in the absence of Connecticut's consent to pay attorneys' fees under §2000e-5(k), attorneys' fees may not be based upon this theory.

Neither of the two recognized exceptions to the American rule against awarding attorneys' fees presents a basis for awarding such fees in litigation against the state, given the purposes of the Eleventh Amendment. Under the "common fund" doctrine, a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, has been permitted to recover attorneys' fees from the fund or property itself, or from the other parties receiving the benefit. *Trustees v. Greenough*, 105 U.S. 527 (1881); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970). However, since *Edelman* precludes the award of retroactive monetary relief against the state, no fund would be available from which to reimburse litigants such as respondents.

In addition, the underlying theory of this exception in spreading the cost of the litigation so as to avoid unjust enrichment of the beneficiaries of the suit does not coincide with the justification for the imposition of prospective injunctive relief, namely to insure the supremacy of

federal law. Rather, the theory looks back to the recovery of funds awarded because of prior breaches of a constitutional or legal duty, and permits the compensation of the plaintiff for incurring the expenses of bringing the suit and amassing such a fund. Since the Court in *Edelman* has already determined that the award of retroactive benefits is not so essential to the effectuation of federal law that it overcomes the Eleventh Amendment bar to suits against the state, that reasoning applies *a fortiori* to an award of attorneys' fees which would be based upon such an award.

To predicate an award of attorneys' fees upon additional retirement benefits flowing prospectively from the operation of the injunction in this case would also be inconsistent with the application of the "common fund" theory. As the Court pointed out in *Alyeska*, supra,

> "In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265, 95 S. Ct. at 1625, n. 39.

In the instant action, the beneficiaries of the lower Court's injunction are all males presently in the state retirement system or who will enter into it. There is no way to trace with accuracy the number of males who will benefit in the future from the prospectively uniform retirement policy mandated by the lower Court's order. Similarly, the share of the future retirement funds attributable to such beneficiaries cannot be calculated, given numerous variables including the number of males in the system, their ages at retirement, and length of service. Accordingly, the "com-

mon fund" rationale fails to provide a basis for an award of attorneys' fees in this case.

Similarly, the "bad faith" exception to the American rule is not invoked for the purpose of securing a constitutional or federal right. Under this theory, attorneys' fees may be assessed where a litigant willfully disobeys a court's order, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404 (1967), or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *F. D. Rich Co. Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165 (citing *Vaughn v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997 (1962). The award of attorneys' fees in such situations constitutes a punitive measure directed against a losing party who has in some fashion abused the legal process. By its very terms, "bad faith" fees do not inexorably flow from injunctive relief granted by a federal court. Rather, the court may, in its discretion, award attorneys' fees where the issue litigated has already been clearly established, *Doe v. Poelker*, 515 F. 2d 541 (8th Cir. 1975), or where the defendants have exercised dilatory tactics in the course of the litigation. *Thonen v. Jenkins*, 517 F. 2d 3 (4th Cir. 1975). Moreover, even in the instance of contempt of court, the judge may decline to award attorneys' fees. *Woolfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973). The decision of a court to award fees on "bad faith" grounds thus turns on grounds unrelated to insuring a defendant's future conformity with federal law. Rather, if awarded at all, attorneys' fees are allowed for the purpose of punishing the losing party for bad faith actions in the past. Consequently, award of fees on this basis cannot be characterized as a necessary prerequisite to the entry of injunctive relief.

Both of the above theories have been described as "assertions of inherent power in the courts to allow attorneys' fees in particular situations . . ." *Alyeska Pipeline Service Co. v. Wilderness Society*, supra, 95 S. Ct. at 1622. However as pointed out in *Edelman*, supra, relief "equitable" in nature may be barred by the Eleventh Amendment. *Hagood v. Southern*, supra; *In re Ayers*, supra. Therefore, the Eleventh Amendment remains a bar to the award of attorneys' fees under either of the recognized exceptions to the American Rule, regardless of whether they are characterized as forms of relief retroactive or prospective in nature.

F. The Award of Attorneys' Fees Against the State Is Not Analogous to the Award of Costs

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Finally, this Court's decision to impose costs upon the state litigant in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S. Ct. 97 (1927), does not provide the precedential authority for awarding attorneys' fees.[10] The Court did not refer to the Eleventh Amendment in *Fairmont Creamery*, possibly because the action had originated as a criminal prosecution by the state. Moreover, costs were found to have been traditionally imposed where judgment was entered against a state, under Supreme Court rule.[11]

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[10] The First Circuit Court of Appeals, in *Souza v. Travisono*, 512 F. 2d 1137 (1st Cir. 1975), concluded that court costs and attorneys' fees seem generically the same, both being litigation expenses recoverable by the successful party. 512 F. 2d at 1140.

[11] Rule 57 of the Supreme Court Rules presently governs the award of costs.

The continued vitality of *Fairmont Creamery* is open to serious doubt. The decision has not been reviewed by this Court in subsequent cases and its underlying rationale is inconsistent with the Court's recent pronouncements in *Edelman v. Jordan*, supra. Costs taxed against the state, however minimal, nevertheless are paid from the state treasury, as are attorneys' fees awarded against the state. On the strength of *Edelman*, amicus suggests that *Fairmont Creamery* not only does not support respondents' claim to an award of attorneys' fees from the state, but that the taxation of costs against the state may no longer be sustained in the face of the prevailing application of the Eleventh Amendment, and that *Fairmont Creamery* should be explicitly overruled.

CONCLUSION

Throughout its decisions in Eleventh Amendment cases, this Court has sought to harmonize the supremacy of the Constitution and federal law with the fundamental independence of the states within the federal system. The Court has been especially sensitive to the potential encroachment on that independence which could result from assertions of federal power over the financial operations of the states. By limiting the scope of federal court rulings absent state consent to suit to prospective injunctive relief and avoiding direct impact upon the state treasuries, the Court has successfully preserved both values. The award of attorneys' fees against the State of Connecticut by the Court of Appeals runs directly counter to the established precedent in this area of the law.

It is respectfully submitted that the decision of the Court of Appeals remanding the case to the District Court for consideration of the propriety of an award of attorneys' fees be reversed.

Respectfully submitted,

ROBERT P. KANE
Attorney General
of Pennsylvania

LAWRENCE SILVER
Deputy Attorney General
Chief, Civil Litigation

MELVIN R. SHUSTER
Deputy Attorney General

ROBERT L. SHEVIN
Attorney General of Florida

ARTHUR K. BOLTON
Attorney General of Georgia

RONALD AMEMIYA
Attorney General of Hawaii

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. TURNER
Attorney General of Iowa

FRANCIS B. BURCH
Attorney General of Maryland

JOHN C. DANFORTH
Attorney General of Missouri

PAUL L. DOUGLAS
Attorney General of Nebraska

ROBERT LIST
Attorney General of Nevada

DAVID H. SOUTER
Attorney General of New Hampshire
WILLIAM F. HYLAND
Attorney General of New Jersey
RUFUS L. EDMISTEN
Attorney General of North Carolina
ALLEN I. OLSON
Attorney General of North Dakota
WILLIAM J. BROWN
Attorney General of Ohio
DANIEL R. MCLEOD
Attorney General of South Carolina
R. A. ASHLEY, JR.
Attorney General of Tennessee
JOHN L. HILL
Attorney General of Texas
ANDREW P. MILLER
Attorney General of Virginia
CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia

Attorneys for Amici Curiae

Of Counsel:
C. RAYMOND MARVIN